Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EMILIANO RUSCITTI and LINDA RUSCITTI GOULD,

Petitioners,

v.

FARMERS INSURANCE EXCHANGE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE COLORADO SUPREME COURT/COLORADO
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the Colorado Court of Appeals unpublicized use of a Pre-Argument Dispositional Memorandum in this case violated due process?

2. Whether the petitioners have been denied due process by the Courts' taking away a favorable jury verdict, despite there being substantial, uncontroverted evidence in support of the jury verdict?

3. Whether the unpublished opinion process in the Colorado Court of Appeals in this case violated due process?

LISTING OF ALL PARTIES TO THE PROCEEDINGS PURSUANT TO RULE 14

Emiliano Ruscitti, Plaintiff/Appellee/Cross-Appellant

Linda Ruscitti Gould, Plaintiff/Appellee/Cross-Appellant

Farmers Insurance Exchange, Defendant/Appellant

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No. 93 -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EMILIANO RUSCITTI and LINDA RUSCITTI GOULD,

Petitioners,

v.

FARMERS INSURANCE EXCHANGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COLORADO SUPREME COURT/COLORADO
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioners, Emiliano Ruscitti and Linda Ruscitti Gould, respectfully pray that a Writ of Certiorari issue to review the order of the Supreme Court of the State of Colorado, denying certiorari as to the unpublished Opinion of the Court of Appeals of Colorado, which overturned a jury verdict in petitioners' favor.

REPORT OF THE OPINIONS BELOW

The opinion (unpublished) of the Colorado Court of Appeals is reproduced as Appendix C to this Petition.

STATEMENT OF JURISDICTION

Respectfully, this Court has jurisdiction, pursuant to the Constitution of the United States, 28 USC §1254, or in the alternative, 28 USC §1257 and Rules of Court of the Supreme Court, Rule 10(c).

APPLICABLE CONSTITUTIONAL PROVISIONS

The Constitutional Amendments involved are the due process clauses of the 14th Amendment to the United States Constitution; Article II, Sections 23 and 25 of the Constitution of Colorado.

APPLICABLE COLORADO RULES PROVISIONS

Rule 38 of the Colorado Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioner, Emiliano Ruscitti was born in Italy. His English language skills are limited, even though he is fluent in his native language.

Linda Ruscitti Gould is the daughter of Emiliano, born in the United States and raised in an Italian-American household.

At the time of an automobile accident described below, Linda Ruscitti Gould was unmarried and she lived at home with her parents.

On May 4, 1985, a Carl Nuckols collided with the Ruscitti family automobile, which was being driven by petitioner, Linda Ruscitti. Both drivers received citations as a result of the accident. It is doubtful that Carl Nuckols would have prevailed if the case had actually gone to trial.

Petitioner, Ms. Ruscitti, promptly reported the accident to the insurance company. The lawyer for Mr. Nuckols negotiated

directly with the respondent insurance company; the petitioners were not personally involved in the negotiations and were, indeed, ignorant of the negotiations.

On May 14, 1987, a summons and complaint were filed by Mr. Nuckols in the District Court, in Weld County, in the State of Colorado.

The affidavit of service filed with the trial court states that defendant (petitioner) Linda Ruscitti Gould was personally served and defendant (petitioner) Emiliano Ruscitti was vicariously served, on May 6, 1987.

The petitioners each deny they were ever served.

On July 29, 1987, a Motion for Entry of Default and Default Judgment was filed by Mr. Nuckols.

On September 25, 1987 there was a hearing on the Motion for Default Judgment, **even though the Ruscittis had automobile liability insurance** and on September 30, 1987 a written judgment was entered against the petitioners in an amount of $35,156.00, plus interest.

Actually, the petitioners knew nothing of and had had absolutely no dealings with Mr. Nuckols' attorney on or before September 25, 1987. The lawyer for Mr. Nuckols, Mr. Sackheim, deliberately waited almost six months before he presented the judgment for $35,156.00 to the respondent insurance carrier in March, 1988. The respondent insurance carrier, during the last ten days the default judgment could be set aside, assumed the defense of petitioners, subject to a reservation of rights.

The respondent insurance company, after they allowed the possibility of the default judgment's, being set aside, to expire, rejected coverage for the petitioners, since petitioners allegedly **failed** to comply with a condition of their policy, namely, to notify the carrier of any suit against them. Thereafter the respondent carrier would not pay for the judgment debt against petitioners, nor give them any assistance in trying to set aside the judgment.

Petitioners obtained non-insurance counsel and on June 27, 1988, filed a Motion to Set Aside Default Judgment.

At the hearing on September 8, 1988, petitioners' non-insurance attorney failed in attempting to set aside the default judgment.

The petitioners, in another related application for Certiorari, tried to appear before this Honorable Court in 90-1547, Emiliano Ruscitti and Linda Ruscitti Gould, petitioners, v. Carl Nuckols, respondent.

To prevent their personal assets from being taken in November, 1988, the Ruscittis had to put up a $50,000 cash bond that eventually paid Mr. Nuckols', THE THIRD PARTY'S default judgment.

In December, 1988, the petitioners sued respondent, Farmers Insurance Exchange for breach of contract and insurance bad faith for its handling of the default judgment between March 22, 1988 and March 31, 1988. Respondent, Farmers Insurance Exchange defended solely upon the failure to give notice after suit.

At trial, the trial court allowed only the breach of contract theory to go to the jury. Plaintiffs received a $64,000 judgment, with their jurors asking the trial court Judge for authority to award more damages.

The oral argument of this case in the Colorado Court of Appeals was held in a public auditorium in Greeley, Colorado, as part of a Law Day celebration and it was videotaped.

The Chief Judge[1], of the panel of three appellate Judges, was Honorable Karen Metzger, who had written the short, prior adverse Colorado Court of Appeals opinion against the Ruscittis referred to in 90-1547 of this Court. Judge Metzger's initial

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[1] Judge Metzger also participated in yet a third adverse Ruscitti decision in *Ruscitti* v. *Sackheim,* 817 P.2d 1046 (Colo.App. 1991).

remarks on this appeal by Farmers, on this insurance case, left little hope for the petitioners, as to their hard earned jury verdict being sustained.

The Court of Appeals, in the second unpublished opinion, authored by Judge Metzger, vacated the jury award and ordered the Ruscittis' case dismissed as to Farmers.

The petitioners sought and were refused certiorari to the Colorado Supreme Court.

REASONS FOR GRANTING THE WRIT

A. DUE PROCESS AS TO PRE-ARGUMENT DISPOSITIONAL MEMORANDUM (PDM)

Counsel's statement as to this Colorado Court of Appeals device is limited because there has been no response to Appendix I.

This device is a tentative opinion provided to Chief Judge of the panel, prepared prior to oral argument[2]. This device has been used for about six years. No rule nor statute provides for this device. This device is within the knowledge of the elite of the profession, but has not been published, nor written about for the benefit of the solo practitioners of the profession, who try to keep current about what to expect in appellate practices.

Petitioners complain not about the device of PDMs, but the lack publication concerning its use. It gives the larger firms an argumental edge that is just not fair. Petitioners needed to know there was a tentative opinion already written.

Due process is flexible, but demands such procedural protection as the particular situation necessitates. *People* v. *Taylor,* 618 P.2d 1127 (Colo. 1980).

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[2] This is different from the memorandum discussed in DEATH PENALTY by William J. Coughlin (1992), at pages 144 and 145.

The due process requires fundamental fairness. *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 191 Colo. 455, 553 P.2d 811 (1976).

"Due Process of Law" within this clause is not equivalent to process of any particular state and has reference rather to a standard of process that may cover varieties of process that are expressive of different combinations of historical or modern, local or other jurisdictional standards, provided they do not conflict with fundamental principals of liberty and justice. *Bute* v. *People of State of Illinois,* 68 S.Ct. 763, 333 U.S. 640, 92 L.Ed. 986 (1948).

By "Due Process of Law" is meant that which, following the forums of law, is appropriate to the case and just to the parties affected; it must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the relief sought. *Hagan* v. *Reclamation Dist. No.* 108, 4 S.Ct. 663, 111 U.S. 701, 28 L.Ed 569 (Cal. 1884).

The requirements of due process have been met when the individual concerned is under the Court's jurisdiction and has been given an opportunity to be heard, *MacFadzean* v. *Lohr,* 152 Colo. 31, 380 P.2d 20 (1963).

Here, the Petitioners could not be heard because they did not realize what they were about to encounter, in the argument, a pre-existing adverse written opinion. This argument was videotaped.

B. DUE PROCESS AS TO UPHOLDING THE JURY VERDICT

Respectfully the Colorado Court of Appeals overlooked that an insurance company must, during a reservation of rights period, not prejudice an insured. Please see *Allstate Insurance*

Co. v. *Troelstrup,* 789 P.2d 415, 420 (Colo. 1990). It is unrebutted that Farmers prejudiced the Ruscittis by not immediately filing a motion to set side the default judgment.

Respectfully, the Colorado Court of Appeals misapprehended and erroneously found the "Trial Court determined that this case involved the alleged failure of the insurance company to undertake **any** defense (Emphasis Supplied)."

Respectfully, to reach and affirm this erroneous conclusions, the Colorado Court of Appeals had to ignore and overlook a letter from Farmers to Mr. Sackheim of March 31, 1988, asking that the judgment be set aside.

Further, "failure to the insurance company to undertake any defense" would require overlooking all the steps taken between March 22, 1988 and April 14, 1988, which include:

The "drop the judgment" letter;

The reservation of rights;

Taking the statement of Emiliano Ruscitti; and

The calls made to the Ruscittis.

Respectfully, the Colorado Court of Appeals erroneous statement that "The plaintiffs' claim that Farmers wrongfully refused to defend them in the prior action" demonstrates a lack of understanding of plaintiffs' claim. Plaintiffs' claim involves a breach of contract by the defendant's ruining plaintiffs' excellent factual defenses, by delay and default.

By a reservation of rights, defendant tells the insured to "butt out" of running the case, subject to the insurance company's right to say it will not pay. This is fundamental.

Simply, the Court of Appeals of Colorado did not follow existing law in setting aside the jury's verdict.

C. DUE PROCESS AS TO THIS UNPUBLISHED OPINION

As a practical matter the vast majority of opinions of the Colorado Court of Appeals have to be unpublished. There are so many; however, where an unpublished opinion ignores Colorado precedent and the Court of Appeals wrote unique law that can adversely affects the Petitioners, the system is not constitutional.

The Court of Appeals so overruled **Savio** at page 1272 of *Travelers Insurance Company* v. *Savio,* 706 P.2d 1258 (Colo. 1985):

> In *Farmers Group, Inc.* v. *Trimble,* 691 P.2d 1138 (Colo. 1984), this court recognized that an insurer handling claims against its insured by third parties owes its insured a duty of good faith and fair dealing. (*Travelers* v. *Savio,* 706 P.2d at 1272)

The Court of Appeals so overruled **Converse** at page 887 of *Converse* v. *Zinke,* 635 P.2d 882 (Colo. 1981):

> A jury's verdict may be set aside and a judgment notwithstanding the verdict entered only when no reasonable person could reach the same conclusion as the jury. *Thorpe* v. *Durango School Dist.,* 41 Colo.App. 473, 591 P.2d 1329 (1978), *aff'd* Colo., 614 P.2d 880 (1980) and see *McGlasson* v. *Barger,* 163 Colo. 438, 431 P.2d 778 (1976). *Converse* v. *Zinke* P.2d at 887.

The Court of Appeals so overruled **Troelstrup** at page 420 of *Allstate Insurance Co.* v. *Troelstrup,* 789 P.2d 415 (Colo. 1990):

> Under these circumstances, Allstate was required only to "take the necessary steps to prevent the main case from going into default or to prevent the insured from being otherwise prejudiced." 7C Appleman, Insurance Law and Practice § 4694 at 53 (1989 Supp.) *Allstate Insurance Company* v. *Troelstrup,* 789 P.2d 415 (Colo. 1990)

The Court of Appeals so overruled **Barnes** at page 505 of *Barnes* v. *Waco Scaffolding and Equipment Company,* 589 P.2d 505 (Colo. 1978):

> It is generally recognized that the insured may be excused for a delay or failure to give the required notice to the insurer where it appears that, acting as a reasonably prudent person, he believed he was not liable for the accident.

The file of Farmers Insurance Exchange showed that Linda Ruscitti was told by a lawyer she could ignore **THE THIRD PARTY** papers. Construing that evidence, in the light most favorable to the Ruscittis, *Barnes* v. *Waco Scaffolding and Equipment Company,* 589 P.2d 505 (Colo.App. 1978), the case properly went to the jury.

In any event, The United States Supreme Court's supervisory authority allows the Supreme Court to intervene to protect the integrity to enforce fundamental Constitutional requirements. *Frazier* v. *Heebe,* 107 S.Ct. 2607, 482 U.S. 641, 96 L.Ed.2d 557 (1987); and *Barnard* v. *Thorstenn,* 489 U.S., 103 L.Ed.2d 559, 109 S.Ct. 1294 (1989).

The Supreme Court has authority to scrutinize the decision of the Colorado State Courts, since those Honorable Courts did not protect petitioners' Constitutional rights to Due Process.

CONCLUSION

Respectfully, the Ruscittis just want what the six jurors wanted to give them after hearing the facts.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EMILIANO RUSCITTI AND LINDA RUSCITTI GOULD,

Petitioners,

v.

FARMERS INSURANCE EXCHANGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT/COLORADO COURT OF APPEALS

AFFIDAVIT OF SERVICE TO OPPOSING COUNSEL

I, John A. Kintzele, hereby certify that on the 29 day of March, 1994, I deposited three true and correct copies of the foregoing in the United States mail, postage prepaid to the following:

HALL & EVANS
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1200 17th Street, Suite 1700
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APPENDICES

A - Order on jury verdict in favor of Ruscitti/Gould.

B - Costs assessment.

C - Non-published Opinion of Colorado Court of Appeals.

D - Order of Colorado Supreme Court denying Certiorari.

E - Motion to include videotape.

F - Order denying videotape inclusion.

G - Letter to Clerk of the Colorado Court of Appeals about Pre-Argument Dispositional Memorandums.

District Court

CITY AND COUNTY OF DENVER, COLORADO

CASE NO. 88-CV-24787 COURTROOM 21

ORDER OF JUDGMENT

EMILIANO RUSCITTI and LINDA GOULD, formerly known as LINDA RUSCITTI,

Plaintiffs,

v.

FARMERS INSURANCE EXCHANGE,

Defendant.

THIS MATTER was tried to a jury. The jury heard the evidence, was instructed on the law, duly deliberated the issues, and returned its verdict. The Court accordingly enters the following Order of Judgment based on that verdict:

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to C.R.C.P. 58, the Clerk of this Court shall, based on the verdict of the jury, FORTHWITH enter upon the register of actions of the Court judgment for Plaintiffs and against Defendant in the amount of $64,500.00, plus post-judgment interest at the statutory rate, plus costs.

All parties shall have 45 days to file Rule 59 motions, during which period execution on the judgment shall be stayed. Execution shall be stayed beyond the 45 day period provided Defendant posts a supersedeas bond in the amount of $70,000.00.

Dated this 2nd day of December, 1991, nunc pro tunc to November 27, 1991.

BY THE COURT:

MORRIS B. HOFFMAN
Morris B. Hoffman
District Court Judge

cc: J. Kintzele
E. Daniels

District Court

CITY AND COUNTY OF DENVER, COLORADO

CASE NO. 88-CV-24787 COURTROOM 21

ORDER

EMILIANO RUSCITTI and LINDA GOULD, formerly known as LINDA RUSCITTI,

Plaintiffs,

v.

FARMERS INSURANCE EXCHANGE,

Defendant.

THIS MATTER is before me on Plaintiffs' Bill of Costs, and Defendant's Objections thereto.

I find that Mr. Dubee's expert fees of $1,330.00 were, under all of the circumstances of this case, eminently reasonable. They represent work he did to review documents and to prepare for and give his expert testimony, all of which work I find was necessary.

I will not award Plaintiffs the $21.90 incurred in witness fees for Mr. Sackheim, since Mr. Sackheim did not testify. §13-16-222(g).

Finally, I will award Plaintiffs all of the $218.97 they seek as costs to prepare and copy exhibits. §13-16-222(f).

Accordingly, costs are hereby awarded in favor of Plaintiffs and against Defendant in the amount of $1,864.47.

Dated this 9th day of January, 1992.

BY THE COURT:

MORRIS B. HOFFMAN

Morris B. Hoffman
District Court Judge

cc: All counsel

Appendices C

No. 92CA0034
No. 92CA0035

Colorado Court of Appeals

June 10, 1993
NOT SELECTED FOR PUBLICATION

EMILIANO RUSCITTI and LINDA RUSCITTI GOULD,
Plaintiffs-Appellants and Cross-Appellees,
v.
FARMERS INSURANCE EXCHANGE,
Defendant-Appellee and Cross-Appellant,
and
GILBERT SACKHEIM; DAY and SACKHEIM; ROBERT GERALD HANNON; and WILLIAM CONTI,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER
HONORABLE MORRIS B. HOFFMAN, JUDGE
HONORABLE CLIFTON FLOWERS, JUDGE
NO. 88CV24787

DIVISION C — JUDGMENT REVERSED
Opinion by JUDGE METZGER
Ney and Marquez, JJ., concur

Jack Kintzele, Denver, Colorado, for Plaintiffs-Appellants and Cross-Appellees

Hall & Evans, Eugene O. Daniels, Malcom S. Mead, Denver, Colorado, for Defendant-Appellee and Cross-Appellant Farmers Insurance Exchange

Robert C. Clarke, Boulder, Colorado, for Defendants-Appellees Gilbert Sackheim and Day and Sackheim

Thorburn, Sakol & Throne, Barre M. Sakol, Boulder, Colorado, for Defendants-Appellees Robert Gerald Hannon and William Conti

Contending that the trial court committed reversible error in its instructions to the jury, plaintiffs, Emiliano Ruscitti and Linda Ruscitti Gould, appeal the judgment entered on a jury verdict finding that defendant, Farmers Insurance Company (Farmers), had breached its contract with them. Additionally, plaintiffs appeal the dismissal of their claims against defendants, Gilbert Sackheim, Day and Sackheim, Robert Gerald Hannon, and William Conti. Farmers cross-appeals, contending that the trial court's submission of the breach of contract claim to the jury was reversible error. We reverse.

I.

Plaintiffs first contend the trial court erred in refusing to submit their instruction concerning third-party bad faith to the jury. They argue that this is not, as the trial court determined, a first-party bad faith case. We disagree.

The wrongful denial of an insurance claim for benefits owed to the insured under an insurance policy is the "essence" of a first-party claim for bad faith breach of insurance contract. *Travelers Insurance Co.* v. *Savio,* 706 P.2d 1258 (Colo. 1985). In contrast, an assertion that the insurer committed bad faith when handling claims of third parties brought against the insured constitutes a third-party claim for bad faith. *Farmers Group, Inc.* v. *Trimble,* 691 P.2d 1138 (Colo. 1984).

Because the insurer retains the absolute right to control the defense of actions brought against the insured, a claim for third-party bad faith is governed by a simple negligence standard. *Farmers Group, Inc.* v. *Trimble, supra.* If the insurer is not sued for

bad faith committed during the course of controlling the defense, however, the insurer is held to the higher standard of knowingly unreasonable conduct. *Travelers Insurance Co.* v. *Savio, supra.*

Here, the trial court determined that this case involved the alleged failure of the insurance company to undertake any defense. Therefore, the claim involved the insured's right under the policy, a direct right, to have a defense provided under the policy. The court found the claim did not involve, as in *Trimble* and other third-party cases, decisions that the insurance company may have made in the course of defending against a third-party. Instead, it involved the fundamental question whether the insurance company would defend or not.

We agree with the trial court's analysis. The plaintiffs claim that Farmers wrongfully refused to defend them in the prior action. This is a direct benefit that they were allegedly entitled to under the policy. Hence, the plaintiffs sued Farmers for the wrongful denial of a direct benefit in a first-party context.

Farmers had never assumed control of the plaintiffs' defense; therefore, the rationale underlying the tort of third-party bad faith is lacking. The trial court, therefore, properly concluded that plaintiffs had asserted only a first-party bad faith claim, and thus, it correctly refused the plaintiffs' jury instruction on third-party insurance bad faith.

II.

In their appeal, plaintiffs also contend that the trial court erred in dismissing their claims against defendants, Gilbert Sackheim, Day and Sackheim, Robert Gerald Hannon, and William Conti. We disagree.

Plaintiffs had filed claims in this action against those defendants for fraud and misrepresentation involving the tort action against them in Weld County that formed the basis of this dispute. However, the issue whether service was proper had been

litigated in the Weld County District Court, which had held that service was proper. Later, that ruling was affirmed on appeal by this court and certiorari was denied by both the Colorado Supreme Court and the United States Supreme Court.

In its dismissal of the claims against Sackheim and Day and Gilbert Sackheim, the trial court determined that plaintiffs' claims for fraud and misrepresentation constituted an independent equitable action directly attacking a prior judgment. It concluded that a direct attack on a prior default judgment must be made in the same court in which the judgment was rendered. We agree with that analysis. *See Winslow* v. *Williams,* 749 P.2d 433 (Colo. App. 1987); *People* v. *ex rel. Dunbar* v. *South Platte Water Conservancy District,* 139 Colo. 503, 343 P.2d 812 (1959).

The trial court also determined that the plaintiffs' claim for wrongful attempt to collect funds in contravention of a stay order was essentially an allegation of contempt of court. The court held that it had no jurisdiction to entertain a contempt action resulting in a violation of the order that had been entered by the Weld County District Court. The trial court properly concluded that jurisdiction to punish a contempt rests solely with the contemned court. *See Gonzales* v. *District Court,* 629 P.2d 1074 (Colo. 1981).

We conclude the trial court acted correctly in dismissing the claims against these defendants.

III.

On cross-appeal, Farmers contends the trial court erred in denying its motion for directed verdict on the breach of contract claim. We agree.

A motion for directed verdict should be granted if, when the evidence is viewed in the light most favorable to the opposing party, one may conclude that there is no substantial evidence to support a verdict in the opposing party's favor. *Salstrom* v. *Starke,* 670 P.2d 809 (Colo. App. 1983). Substantial evidence is that which is probative, credible, competent, and of a character which

would warrant a reasonable belief in the existence of the facts supporting a particular finding. *Rathburn* v. *Industrial Commission,* 39 Colo. App. 433, 566 P.2d 372 (1977).

Provisions in an insurance policy obligating the insured to give the insurer notice of an accident and notice of the initiation of suit are conditions precedent to coverage. Compliance with these conditions precedent is mandatory. *Marez* v. *Dairyland Insurance Co.,* 638 P.2d 286 (Colo. 1981).

The obligation to forward suit papers exists independently of the obligation to give notice of an occurrence. The insurer's knowledge of an accident, therefore, does not relieve the insured of its obligation to forward suit papers. *Thomas* v. *Guaranty National Insurance Co.,* 43 Colo. App. 34, 597 P.2d 1053 (1979). Failure to comply constitutes a breach of the insurance contract which relieves the insurer of any obligation to defend or indemnify the insured, absent justifiable excuse. *Graton* v. *United Security Insurance Co.,* 740 P.2d 533 (Colo. App. 1987).

Here, it is undisputed that the plaintiffs gave no notice to Farmers, their liability insurer, that they had received service of process in an action against them and did not forward documentation to Farmers as required by the policy. It is also undisputed that Farmers received no notice of the initiation of the lawsuit against plaintiffs until nearly 11 months after the complaint had been served upon the plaintiffs and until almost six months after the default judgment had been entered. Farmers finally received notice from the third-party's attorney and not from the plaintiffs.

As a matter of law, these facts constitute a breach of plaintiffs' obligation immediately to forward suit papers to Farmers. *See United Services Automobile Ass'n* v. *Allstate Insurance Co.,* 662 P.2d 1102 (Colo. App. 1983) (delay of seven months before notifying insurer of suit constitutes, as a matter of law, breach of policy); *Certified Indemnity Co.* v. *Thun,* 165 Colo. 354, 439 P.2d 28 (1868) (delay of 73 days before giving insurer notice of accident constitutes breach of policy).

Therefore, plaintiffs breached their insurance contract by failing to perform a condition precedent. This breach relieved Farmers of its duty to defend the lawsuit.

A.

Plaintiffs respond that their failure to notify Farmers was the result of justifiable excuse. Therefore, they contend, Farmers had a duty to defend them. We do not agree.

In support of this argument, plaintiffs rely on comments made by plaintiff Emiliano Ruscitti in a conversation with a Farmers' claim adjuster. Ruscitti states: "I didn't see the papers, and like I say, [plaintiff] Linda [Ruscitti Gould] talked to her lawyer. Actually, she used to work in a bank where she used to work in and this lady lawyer told her, 'Don't even pay attention, you don't have to worry about it . . . you're just a server, just throw them away.' "

However, at trial, plaintiff Linda Ruscitti Gould did not testify that she discarded the summons and complaint in reliance on the advice of an attorney. Instead, she testified that her father's comments about the advice of an attorney at the bank concerned a demand letter she had received before suit was filed, and did not concern the summons and complaint.

Additionally, the attorney testified that the only matter concerning the auto accident which Linda Ruscitti Gould had discussed with her was the demand letter and that the attorney had advised her to contact her insurance carrier immediately.

We note, too, that plaintiffs' contention, that Linda Ruscitti Gould was never served with process in the default judgment action, was *res judicata* in this action. *See City of Westminster* v. *Church,* 167 Colo. 1, 9, 445 P.2d 52, 55 (1974) ("The best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties [or their privies] . . . is whether the same evidence would sustain both, and if it would the two actions are the same, and this is true, although the two actions are different in form.").

In order to determine that plaintiff Emiliano Ruscitti's statements to the adjuster constituted "probative, credible, competent [evidence] of a character which would support a reasonable belief in the existence of facts supporting a particular finding," as required by *Rathburn* v. *Industrial Commission,* 34 Colo. App. at 435, 566 P.2d at 373, the determinations in the default judgment action, as well as the testimony in this action of plaintiff Linda Ruscitti Gould and the attorney who was a party to the conversation, would have to be disregarded.

We conclude that there is simply no credible evidence in the record to support the hypothesis that Linda Ruscitti Gould had discarded the summons and complaint on the informal advice of a non-retained attorney.

While the law recognizes justifiable excuse for failure to give notice of an accident premised on the reasonable belief of non-liability, this justifiable excuse exists only when the insured has exercised a high degree of care in evaluating the circumstances and reasonably believes he or she is not liable. *Interstate Fire & Casualty Co.* v. *Burns,* 29 Colo. App. 276, 484 P.2d 1257 (1971). Moreover, ignorance or mistake as to insurance coverage which is caused by the insured's failure to become familiar with the policy provisions in inexcusable as a matter of law. *Graton* v. *United Security Insurance Co., supra.*

Even if we were to assume that Linda Ruscitti Gould had been served and that she did speak to the attorney, the act of discarding a summons and complaint on the informal advice of a non-retained attorney, acquired during a casual lunch conversation, does not demonstrate the exercise of a high degree of care in evaluating all the circumstances. Hence, we conclude, as a matter of law, that there was no justifiable excuse in the plaintiffs' failure to give Farmers notice.

B.

Plaintiffs also respond that Farmers waived the policy's notice provision by assuming control of the defense in its reservation of rights letter and in its no coverage letter and that it is now estopped from asserting otherwise. We reject these assertions.

Waiver is the intentional and voluntary abandonment of a known right. *See Gulf Insurance Co.* v. *State,* 43 Colo. App. 360, 607 P.2d 1016 (1979).

As a general proposition, the investigation of a case or, indeed, even the presentation of a defense under a reservation of rights letter does not constitute a waiver of any contractual defenses an insurer may have. *Nikolai* v. *Farmers Alliance Mutual Insurance Co.,* 830 P.2d 1070 (Colo. App. 1991). As a matter of law, a reservation of rights letter constitutes an assertion of noncoverage. *Allstate Insurance Co.* v. *Troelstrup,* 789 P.2d 415 (Colo. 1990).

The reservation of rights letter here states:

> Your policy of insurance may not afford coverage for this occurrence, or for any claims arising out of it, because by not informing us of the Summons you received, you have failed to comply with condition number 3, the notice provision of the policy. This states, 'If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, or summons or other process received by him or his representative'. Our right to deny coverage for the above occurrence is not limited to the reasons set out above, but shall include any additional grounds for non-coverage, or policy breach, which may be revealed.
>
> We will investigate this occurrence to determine the facts of the accident and to obtain information on any

> claims that may arise therefrom. The Farmers Insurance Exchange does so with a full reservation of its rights under the law and under the insurance policy. Neither by investigating, negotiating for settlement, or settlement, nor by undertaking the defense of any legal action which may result from this occurrence does Farmers Insurance Exchange waive its right to deny coverage.
>
> Farmers Insurance Exchange reserves the right at any time, upon reasonable notice to you, to withdraw from the investigation of the accident or from the defense of any suit arising out of the accident.

Its unambiguous language notifies plaintiffs of their breach of the insurance contract and states only that "we will investigate" the situation.

Therefore, because this letter, as a matter of both law, *Allstate Insurance Co.* v. *Troelstrup, supra,* and by its plain terms, constitutes an assertion of non-coverage and a willingness only to investigate, it cannot be a waiver by Farmers.

C.

We also reject the estoppel argument advanced by plaintiffs.

If an insurer conducts an investigation or defense under a reservation of rights, the insurer is not estopped thereafter from asserting any policy defenses it might have. *Allstate Insurance Co.* v. *Troelstrup, supra.*

Additionally, one of the elements of estoppel is detrimental reliance. *Kiely* v. *St. Germain,* 670 P.2d 764 (Colo. 1983). The record here contains no evidence that plaintiffs relied on the language in Farmers' reservation of rights letter to their detriment. They had done nothing in the underlying lawsuit before receiving the letter, and there is nothing to indicate that they acted, or refrained from acting, in the lawsuit after receiving it.

Moreover, we conclude that the trial court erred in considering the second letter in conjunction with the reservation of rights letter in denying Farmers' motion for directed verdict. The second letter does say that: "We are withdrawing from the defense of this suit." However, in determining what a reasonable insured would understand from the first letter, it must be looked at alone, because the gist of the Ruscittis' suit concerns Farmers' conduct during the nine-day period between the two letters.

We have already determined that the reservation of rights letter, as a matter of fact and law, did not obligate Farmers to defend plaintiffs. Any language in the second letter, therefore, is superfluous and irrelevant.

Consequently, because the plaintiffs did not satisfy a condition precedent to coverage under the insurance contract, the trial court erred, as a matter of law, in submitting the breach of contract claim to the jury.

The judgment is reversed.

JUDGE NEY and JUDGE MARQUEZ concur.

Supreme Court

STATE OF COLORADO

Case No. 93SC541

CERTIORARI TO THE COLORADO COURT OF APPEALS, 92CA0034 & 92CA0035 DISTRICT COURT, CITY AND COUNTY OF DENVER, 88CV24787

ORDER OF COURT

EMILIANO RUSCITTI and LINDA RUSCITTI GOULD,

Petitioner,

v.

FARMERS INSURANCE EXCHANGE,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 4, 1994.

cc: Jack Kintzele
1317 Delaware Street
Denver, CO 80204

Eugene O. Daniels
HALL & EVANS
1200 17th Street, #1700
Denver, CO 80202

Honorable Morris B. Hoffman
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

Clerk of the District Court
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

Marj Blea, Acting Clerk
Colorado Court of Appeals

Appendices E

No. 92 CA 0034
No. 92 CA 0035

Court of Appeals
STATE OF COLORADO

MOTION TO MAKE THE VIDEO TAPING OF THE ORAL ARGUMENT A PART OF THE RECORD FOR PURPOSES OF FURTHER APPEAL

EMILIANO RUSCITTI and LINDA RUSCITTI GOULD,
Plaintiffs-Appellants/Appellees,

v.

FARMERS INSURANCE EXCHANGE; GILBERT SACKHEIM; DAY and SACKHEIM; ROBERT GERALD HANNON; and WILLIAM CONTI,
Defendants-Appellees/Appellants.

Appeal/Cross Appeal from Denver County District Court, Civil Action No. 88 CV 24787, Courtroom 21, Honorable Clifton Flowers and Honorable Morris B. Hoffman, District Court Judges

For the above, plaintiffs-appellants, by their attorney, Jack Kintzele, respectfully state:

1. The video taping of the oral argument is a proper and necessary part of the record.

2. The plaintiffs-appellants intend to further appeal the above case, as to Farmers Insurance Exchange, only.

Respectfully submitted,

JACK KINTZELE

Jack Kintzele, #1842
Attorney for Plaintiffs-Appellants
1317 Delaware Street
Denver, Colorado 80204
(303) 892-6494

CERTIFICATE OF SERVICE

On this 18th day of June, 1993, a copy of the above was mailed to:

HALL & EVANS
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Denver, Colorado 80202

Robert C. Clarke, Esq.
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Barre M. Sakol, Esq.
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Boulder, CO 80302

Appendices F

No. 92 CA 0034
No. 92 CA 0035

Court of Appeals, State of Colorado

MOTION TO MAKE THE VIDEO TAPING OF THE ORAL ARGUMENT A PART OF THE RECORD FOR PURPOSES OF FURTHER APPEAL

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March 10, 1994

Colorado Court of Appeals
Attn: Patrick Stanford, Clerk
2 East 14th Avenue
Denver, CO 80203

Re: Pre-Oral Argument Memorandum

Dear Mr. Stanford:

It is my understanding that the Colorado Court of Appeals Judges, the three person panels have what is in effect a contemplated decision in front of them at the time of oral argument. Please advise me, as much as you can, concerning the history of these types memorandums, how long they have been used, how close they are to the final opinions and how those memorandums are developed.

I would appreciate your most kind and prompt attention to this correspondence, as soon as possible.

I thank you in advance for your attention to this correspondence.

Very truly yours,

/s/ Jack Kintzele
Jack Kintzele

JK:ps